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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 493

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, A CORPORATION; WILSON McCARTHY AND HENRY SWAN, TRUSTEES OF ITS PROPERTY,

Petitioners,

vs.

PROVO CITY, A MUNICIPAL CORPORATION; MAURICE HARDING, MAYOR, AND JOSEPH H. SWAPP AND BLAKE D. PALFREYMAN, COMMISSIONERS OF SAID PROVO CITY,

Respondents.

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Respondents.

REPLY BRIEF OF PETITIONERS ON PETITION FOR WRIT OF CERTIORARI

I and II

The authority and principle of Wall v. Salt Lake City was not changed by statute and was re-affirmed by the Supreme Court of Utah in Tooele City v. Elkington after the statutory enactment referred to.

Herein of Respondents' Points I and II.

Under Point I respondents argue as if Section 15-8-8

Revised Statutes of Utah 1933 and Utah Code Annotated 1943 had been amended in 1917 for the purpose of changing the rule in *Wall* v. *Salt Lake City*. As a matter of fact, the amendment in question was made in 1915, Laws of Utah 1915, Chapter 100, page 157. The *Wall* case had not yet been decided and was not decided until October 30, 1917.

Under Point II respondents contend that the rule in the *Wall* case was changed by the Supreme Court of Utah in *Tooele City* v. *Elkington*. On the contrary the principle of the *Wall* case was reaffirmed and applied by the court to the facts in the *Elkington* case and it was decided that the necessary elements of estoppel were not present. Indeed the Supreme Court itself, without suggestion or citation of the *Wall* case by counsel, raised the question as to whether Tooele was estopped under the doctrine of the *Wall* case. The question was whether a public street in a dedicated plat, which had never been used, could be deeded by Tooele City. It was held that it could not be. The history of Section 15-8-8 was described and attention was called to the fact that the statute was not complied with. The court, however, did not regard that as eliminating the doctrine of estoppel in pais but expressly recognized and applied the doctrine of the *Wall* case. If the court had regarded Section 15-8-8 as eliminating the doctrine of estoppel, that would have been the short answer in the case. Instead of that the court considered the equities of the case and concluded that there was no ground for the application of the estoppel and the principle of the *Wall* case. On page 494 the court said:

> In the case at bar, the consideration given the city by Elkington was small, if anything; the deed was made in contravention of the statute; there is no evidence that the property has been assessed against the defendants or their predecessor in interest; the time element is short; and there was not a replatting or a change in the whole neighborhood to the benefit of all adjacent landowners.
>
> Balancing the justices of the cause, we find there is no ground for an estoppel in pais as against the city.

The foregoing is according to the reasoning of Circuit Judge Phillips in his dissenting opinion, which is based upon unanswerable logic both as to the *Elkington* case and *Hall* v. *North Ogden City*. (R. 567.)

III

The elimination of the crossing made it unnecessary to secure from the Public Service Commission of Utah any order permitting the Railroad to cross Ninth South Street.

Herein of Respondents' Point III.

Respondents inaccurately state on page 8 that Sec. 76-4-15, U. C. A. 1943, gives the Public Service Commission exclusive power to abolish any crossing. A reading of the statute will disclose that it only gives the Public Service Commission exclusive power to determine and prescribe the manner, including the point of crossing and terms of installation, of a railroad over a public street. The statute is thus construed in *Union Pacific R. Co., et al.* v. *Public Service Commission*, 103 Utah 186, 134 Pac. (2d) 469, which holds that the power granted to cities by Section 15-8-8, U. C. A. 1943, prior to the Public Utilities law was not repealed by implication thereby. See page 195.

Analysis reveals that the decision of the question raised by respondents under Point III will follow the decision of whether the City was properly estopped to claim that the crossing was not vacated, abandoned or closed.

If the City had kept its promise to pass an ordinance eliminating the Ninth South crossing, the fee to that property, owned by the Trustees of The Denver and Rio Grande Western Railroad Company (R. 25, 26 = 158), would have been freed from the public easement. There would have been no public street to be crossed by the new railroad tracks and the Public Service Commission of Utah would have no jurisdiction whatever over the construction of said new tracks on property owned by the Trustees. If the City is estopped to claim that the crossing is not closed, vacated or abandoned, as required by law, as concluded by the court (R. 27), the case is precisely the same as that assumed above. Physically

there is no public street across that space. Exhibits 7, 8 and 10 (R. 511, 513, 517) are pictures of the space formerly occupied by Ninth South. Exhibit 12 (R. 521) shows the barricade on the west side of the tracks. Exhibit 9 (R. 515) shows the barricade on the easterly side of said tracks. *De facto* closing and vacation of Ninth South Street occurred in May, 1943, and has since existed.

Provo City now attempts to claim that the crossing was not vacated because no ordinance was passed. The District Court held that the City was estopped to make such a contention. If the District Court were correct, the situation so far as Provo City is concerned is precisely as if the ordinance had been passed as promised. This is exactly the effect given the estoppel in *Baldwin* v. *Trimble*, 85 Md. 396, 37 Atl. 176, and in *Grand Trunk Western R. Co.* v. *City of Flint*, 55 Fed. (2d) 384.

These perhaps are the reasons that induced the Public Service Commission to take the view expressed to Bradford and Jensen that they did not regard the controversy between the Railroad and the City as a matter in which the Public Service Commission had any interest and that it did not propose to pull chestnuts out of the fire for Provo City. (R. 108.)

IV

There is no substance to respondents' contentions with regard to the Utah referendum statute.

Herein of Respondents' Point IV.

It must be clear that a municipality cannot avoid the estoppel resulting from the acts and conduct of its Commission by pointing to the referendum statute and contending that they are thereby deprived of their right to resort to the referendum statute. The City's contention in this particular would eliminate the settled law of Utah, announced by the *Wall* and *Elkington* cases, that municipalities may be equitably estopped under certain circumstances.

Respondents' brief would make it appear that the citizens of Provo are anxious to avoid the closing of Ninth South Street but are frustrated in that desire by the doctrine of

equitable estoppel. This is based upon a petition in March, 1943, signed by some 200 citizens protesting the closing of the crossing. Respondents assume that no more diligence is required by citizens to protect their rights than merely to file a petition with the City Commission even though thereafter they slumber soundly on their rights. There was a public announcement that the protest was disregarded by the City. The Mayor of Provo told the press on April 7, 1943, that the street would be closed and the enlargement of the yards would proceed. (Exhibit 26, R. 533.) During the two or three months thereafter the streets actually were closed and the yards constructed. If the citizens of Provo were so vitally interested in the matter, then was the time for them to move effectively by injunction, by "initiating" an ordinance to prevent the street closing under the referendum statute or other appropriate procedure. Instead, they were content to protest and remain silent when their protest was ignored.

The Supreme Court of Utah has held that this is not sufficient diligence. *Lewis* v. *Pingree Nat. Bank*, 47 Utah 35, 151 Pac. 558. The Bank entrance encroached on a public street so that it partially obscured the show windows on either side thereof. The owners on either side protested but did nothing more during the construction of the building. The court held that it was not enough to protest but that affirmative steps should have been taken to prevent the purpresture. The court on page 48 said:

> So here. If the plaintiff desired to prevent the erection of the bank front as planned, and as all others who were interested with him understood it was planned, and as he must have known it was planned and was being constructed, why did he not bring an action, as was done in the Tyson Case, which he now cites and relies on? Had he done that, the courts would undoubtedly have prevented the defendant from proceeding to erect the front as proposed by it. * * * Under those circumstances we think the plaintiff should be limited to his legal remedy, namely, the recovery of such an amount of damages as the usable value of his building may be depreciated by reason of the construction of the bank front as it now is.

V

Respondents' statements as to the facts disregard the findings of fact which are supported by substantial evidence and are therefore binding upon the appellate court.

Herein of Respondents' Point V.

Rule 52 of Rules of Civil Procedure for the District Courts of the United States provides as follows:

> Findings of Fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

The court in compliance with that Rule made separate findings of fact and conclusions of law. (R. 18-26.)

Respondents on pages 12-14, 16 and 17, contend that the Mayor and Commissioners did not promise that the ordinance closing the streets would be passed. They state that there is no such promise and that the record reflects nothing more than negotiations, discussions, correspondence and controversy with respect to the closing of Ninth South Street. This disregards the Court's finding that there was a promise by the Mayor and City Commissioners. (R. 20.) The fact thus found was accepted as binding upon the Circuit Court of Appeals by the majority opinion, which made the statement:

> "The Company, and the Mayor and Commissioners of the City, entered into negotiations resulting in an oral agreement that an ordinance would be passed closing Ninth South Street at the point where the existing tracks crossed it and that the facilities within the City would be enlarged." (R. 557.)

The minority opinion also so described the agreement. (R. 562, 563.) That finding is supported by the evidence of Bradford (R. 77, 78), Jensen (R. 141) and Lawrence (R. 168). The Mayor denied that the Commission promised the Railroad to pass an ordinance (R. 237) but merely said that the Commission would consider passing it. (R. 236.) Commissioner

Swapp both affirmed and denied that any commitment was made at the meeting. (R. 377.) Commissioner McGuire, when asked the direct question whether any commitment was made, answered, "I don't recall that there was any definite statement to that effect." (R. 409.) That the foregoing evidence supporting the finding is substantial and the finding not clearly erroneous will clearly appear from a reading of the above references to the record.

On pages 14, 15, and 17, respondents disregard the Court's findings in stating that the Railroad did not rely upon the agreement above described. The trial Court found the contrary. (R. 21.) The majority opinion of the Circuit Court of Appeals so stated this fact: "But relying upon the verbal agreement that it would be passed, the Company barricaded the street and constructed the enlarged facilities." (R. 557.) The minority opinion also so stated the fact. (R. 564.) The finding is supported by the uncontradicted evidence. The Railroad, relying on that promise, abandoned the alternative of building outside of Provo in the open country where there would be no problem of city streets crossing the yards. The Railroad, relying on the promise (R. 206) immediately after April 7, 1943 secured easement for (R. 96) and constructed (R. 96) the cut off road, 41.25 feet wide by 625 feet long (R. 97), from Fifth East to Ninth South. The cutoff road was constructed by the Railroad, accepted as a public road, was scraped and graded by Provo (R. 416) and has been constantly used as such. (R 261, 416.) It is shown on the Provo map as a public street. (R. 261.) The Railroad secured property rights necessary for the new yards and grading therefor was commenced north of the crossing on April 11, 1943 (R. 181) and continued until September, 1943. (R. 94, 95.) The Ninth South crossing was barricaded and closed to traffic in May, 1943. (R. 182.) Eght new tracks were laid across Ninth South in June and July, 1943 (R. 183) at a cost to the Railroad of $160,000. (R.21, 22 = 94-101.)

Respondents also disregard the findings of the trial court in stating on pages 15 and 19 that the evidence fails to show that the plaintiffs suffered or will suffer irreparable damage if the street is opened for use by the public. The majority

opinion of the Circuit Court of Appeals did not discuss this matter. The minority opinion showed in detail that irreparable injury would result to the Railroad. (R. 565.) The Court so found. (R. 23.) The evidence conclusively shows that the opening of Ninth South Street across the railroad yards and tracks would make it necessary for trains and cuts of cars being switched or stored to be divided at the crossing (R. 23 — 103); would make necessary much slower handling of trains and cars in the yards (R. 23 — 189); would reduce the usefulness and efficiency of said yards to the extent of approximately fifty percent (R. 23 — 104); would greatly increase the cost of operation of said railroad by said Trustees (R. 23 — 103); would constitute a serious danger and hazard to the public traveling across said railroad yards and tracks (R. 23 — 103-105, 187-190, 191-199); might make it impossible to handle the traffic (R. 24 — 104); would interfere with the efficient operation of the railroad and increase the costs of operation (R. 24 — 103-106); and might require abandonment of the new yards and relocation of the same outside Provo City at a cost of approximately $100,000.00. (R. 24 — 103-105, 187-190, 191-199.)

On page 17 respondents disregard the trial court's findings in contending that the City officials imposed five conditions to the closing of the Ninth South Street crossing. The trial court found that there were only two such conditions imposed (R. 20-21) and that the Railroad had not failed to fulfill them. (R. 24-25.) This finding is not discussed by the majority opinion of the Circuit Court of Appeals. The minority opinion stated the fact according to the trial court's finding. (R. 565.)

As to the first asserted condition, the court found that the Railroad never represented to nor promised Provo City that it would eliminate the protests or objections of any citizens or residents of Provo City and Utah County to the closing of said streets, but on the contrary affirmatively and consistently stated that it would not do so. (R. 24.) Mayor Harding testified both on direct (R. 234) and cross (R. 263) that Bradford stated at the February 25, 1943 meeting in the most specific and positive way that the Railroad could and would do nothing to eliminate the protests. Bradford also so testified (R. 131).

As to the second asserted condition, the court found and the evidence is, without any conflict, that the Railroad did not represent or promise Provo City that it would provide any crossing over, under or upon said railroad tracks but on the contrary has affirmatively and consistently informed Provo City, its Mayor and Commissioners that it would not do so. (R. 24 — 92, 141, 236, 396, 410.)

As to the third asserted condition, the court found that Provo City has never moved the water and light lines referred to; has never billed Trustees for the cost thereof; and Trustees have repeatedly stated their willingness to pay such costs and have requested bills therefor. (R. 24, 25.) This is supported by the uncontradicted evidence of Bradford (R. 107, Ex. 30 R. 111, Ex. 40 R. 122) and Mayor Harding (R. 314).

As to the fourth asserted condition, no contention is made by respondents that this condition was not met. The Court found that it was. (R. 21.) The uncontradicted evidence supports the finding.

As to the fifth asserted condition, the court found that the Public Service Commission of Utah informed the Railroad that it was not concerned with the closing of Ninth South Street and Fifth East Street or with the occupation by said railroad tracks of the space formerly occupied by said streets. (R. 24.) This was according to the uncontradicted evidence of Bradford (R. 108) and Jensen (R. 148). They quoted the Chairman of the Public Service Commission as so saying and of adding that they were not going to pull the chestnuts of the Provo City Commission out of the fire.

Respondents disregard the findings of the trial court on page 18 in stating that the City Officials did not acquiesce in the closing by the Railroad of Ninth South Street. The Court found that they did acquiesce. (R. 22, 23.) The majority opinion of the Circuit Court of Appeals did not discuss this matter. The minority opinion stated the facts of acquiescence in detail. (R. 564.) The evidence conclusively shows that the Mayor and Commissioners and City government as a whole acquiesced in the closing. Mayor Harding said that

he expected the Railroad to go ahead as it did, build the yards and barricade Ninth South, and that is why he didn't protest or prevent when he saw the Railroad so doing. (R. 258, 259.) J. P. McGuire, Commissioner of Streets (R. 412), knew when the streets were barricaded in May, 1943 (R. 413), wasn't surprised (R. 413), and made no objection or protest (R. 416, 417). When the Railroad provided the cut-off road he accepted it and scraped and graded it. (R. 416.) Commissioner Swapp knew that the streets were barricaded in May, 1943 (R. 383). The Mayor and Commissioners discussed the barricading of the streets (R. 383) and nothing was said to the effect that the Railroad was closing the streets without authority (R. 384). No one in the Provo City government made any protest or objection. (R. 171, 182.) The Mayor, Commissioners, City Attorney and City Engineer were in close touch with the construction of the new yards. They knew of the closing and barricading of Ninth South in May, 1943 (R. 251). They didn't communicate with the Railroad in any way about the closing and barricading. (R. 251.) The Commission made no charge that the closing and barricading was unauthorized during 1943 or 1944. (R. 252.) Ninth South and Fifth East have been barricaded and closed to travel ever since May, 1943. No effort has ever been made to open Fifth East Street (R. 168, 261). No effort was made by Provo City to open Ninth South until March, 1945. (R. 250, 251.) Prior to that time the City did not even ask the Railroad to open it. (R. 253.)

Respondents disregard the Court's finding in stating on page 18 that there was no acquiescence on the part of the public in the closing of Ninth South Street. The Court found that there was such acquiescence. (R. 22, 23.) The majority opinion of the Circuit Court of Appeals does not discuss these facts and evidence. The minority opinion states the fact in accordance with the trial court's finding. (R. 564.) The evidence clearly supports the trial court's finding. The fact of the closing of Ninth South and Fifth East Streets was conspicuously published in the Provo Press. (R. 22-23 = Exhibit 26, R. 90, 553) and was well known to citizens and residents of Provo City and Utah County. (R. 23 = 319, 342, 361, 366.) Approximately two hundred residents of Provo

City and Utah County prior to March 4, 1943, and thereafter protested in writing to the Mayor and Commissioners about the closing of Ninth South Street, but took no other or effective measures to prevent the same. (R. 23 — 346.) All other citizens and residents of Provo City and Utah County acquiesced in and made no objection to the closing of Ninth South Street. (R. 23.) No objection has ever been made to the closing of Fifth East Street where it formerly approached to and joined with Ninth South Street, by Provo City, its Mayor, any of its Commissioners, or any of the citizens or residents of Provo City or Utah County. (R. 23 — 168.)

The only authority cited by respondents on Point V is Elliott on Roads & Streets, 3rd ed., v. 2, sec. 1189. At pages 15 and 16 respondents set forth the entire section except the last paragraph, which reads as follows:

> It may be, however, that where there has been an abandonment or there have been misleading acts or other peculiar circumstances, as in some of the cases cited in the first two notes to this section, and improvements have been made and rights acquired on the faith thereof, such a case may be made as will justify the application of the doctrine of estoppel.

In the Fourth Edition of the same work the author states the doctrine much more strongly for the application of estoppel in the case at bar by adding to Sec. 1189 the following sentence:

> Such appears to be the general rule sustained by the weight of authority when the making of valuable improvements in a highway has been induced by the act of the municipality.

In footnote 9 on page 1696 Elliott cites cases supporting his statement from Illinois, Indiana, Iowa, Maryland, Michigan, Massachusetts, Montana, Nebraska, Ohio, Oregon, South Carolina, Wisconsin, Wyoming, New Jersey, Oklahoma, Texas and Utah. The Utah case is *Wall* v. *Salt Lake City*.

CONCLUSION

Respondents' brief is based wholly upon a complete misunderstanding of the cases of *Tooele City* v. *Elkington* and *Hall* v. *North Ogden City* and upon a complete disregard of the findings of the Court, all of which are based upon substantial evidence, not clearly erroneous and therefore not to be set aside or disregarded. The decision of the Circuit Court of Appeals should be reversed and the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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